

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MINNESOTA

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4 United States of America,)	CR 09-219 (DWF/SRN)
)	
5 Plaintiff,)	SENTENCING HEARING
)	
6 -v-)	
)	
7 Pastor Sanchez-Martinez,)	March 25, 2010
)	10:30 o'clock, a.m.
8 Defendant.)	St. Paul, Minnesota

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12 BEFORE THE HONORABLE JUDGE DONOVAN W. FRANK

13 UNITED STATES DISTRICT COURT JUDGE

14 CRIMINAL SENTENCING PROCEEDINGS

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16 SPANISH/ENGLISH INTERPRETER: Marianne McEvoy
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19 (Defendant present.)
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1 (In open court.)

2 THE COURT: If counsel wants to come to the
3 podium? And we can first, Ms. Schaffer, swear in our
4 interpreter this morning. Mr. Newberry, good morning.

5 MR. NEWBERRY: Good morning, Your Honor.

6 THE COURT: Mr. Olson, good morning.

7 MR. OLSON: Good morning, Your Honor.

8 THE COURT: I will explain the delay in
9 starting once we administer the oath to the interpreter?

10 THE CLERK: Sorry.

11 (Interpreter sworn.)

12 THE COURT: The reason that we were late in
13 coming in is -- I am responsible for it, but I asked the
14 Probation Officer to make a call about something that I
15 don't believe will have any effect on the sentence
16 today. I suspect defense counsel will agree with me --
17 I will see what Mr. Newberry says.

18 And I probably should have known this before,
19 but did not, and that is since the -- not only were all
20 the sex-related criminal charges dismissed when there
21 was a plea to terroristic threat, and if I go by the
22 sentence the State Judge gave, he gave everything but a
23 written apology to the Defendant and didn't even follow
24 the State Guidelines, which I have here, because he did
25 plead to the most serious terroristic threat under

1 Subdivision 1. That is the highest rated. It is not
2 rated very high under the state law, but it is higher
3 than Subdivisions 2 and 3.

4 And there is no distinction made between gets
5 an intentional felony, and we will get into that
6 argument here. The reckless disregard language is the
7 second element, there is an intent to threat, all part
8 of Subdivision 1.

9 Well, that argument aside, I saw the
10 predatory sex offender registration. And I learned this
11 morning, and maybe everybody but me knew this, it is
12 irrelevant that that was dismissed. Once you are
13 charged with -- if there is an exception -- I just
14 called somebody to get some confirmation, that the
15 Defendant is a registered sex offender and he is in
16 compliance as we speak.

17 The compliance piece really wasn't what I was
18 looking for. The inquiry was in my own ignorance, if
19 the charges are dismissed, and there is no element that
20 even hints sex in the elements of the offenses pled to,
21 how do you become a registered sex offender? And it is
22 the charge, as we found out.

23 So, whether there is some other remedy that
24 goes far beyond this Court or the focus of the issues
25 today is another matter. But, we called probation and

1 they have a list. And your client is there. They have
2 got where he is at currently, that he is in compliance,
3 he has been at the Sherburne County Jail. So, I guess
4 even though I actually -- my reason to seek that
5 information was I looked at the State Court records, and
6 it was clear that the charge had been dismissed. In
7 fact, terroristic threat wasn't even part of the
8 original complaint, which isn't entirely unusual. But
9 the -- and that must have been part of the plea
10 agreement once they put it together.

11 So, I don't believe that will have any role
12 in the main focus of what is a fair sentence today, but
13 we shall see with respect to that sex offender
14 registration.

15 My suggestion would be this, that there is
16 one objection that does not relate to the advisory
17 guideline computation with respect to the factual
18 content of the charges that arose out of the eventual
19 plea to terroristic threat. We can take that up now or
20 as part of the overall argument, or we can take that up
21 now and I can grant or deny the motion to delete that
22 language from the presentence report, even though
23 neither side claims it relates to the computation.

24 Or, we can take up at the end of the hearing
25 once we have dealt with the sentence and imposed a

1 sentence. Do you have a preference, Mr. Olson? I doubt
2 that Mr. Newberry will probably have a view one way
3 or -- he will probably take it up either way.

4 MR. OLSON: Oh, I think kind of in the
5 chronological systematic approach to these things, maybe
6 we should take that up now. I have objected to the
7 wholesale inclusion of the factual averments from the
8 criminal complaint, in part because from my perspective,
9 as I've noted throughout my position papers, is that
10 there are two sides to that story and we dispute those
11 facts and maintain that many of them are false.

12 I have asked that they be deleted from the
13 PSR; but, more importantly is that since those facts are
14 contested, it would be inappropriate for the Court to
15 rely on contested facts in making a fair determination
16 about what to do in this case, unless those facts are
17 somehow proven. So I think my objection is duly noted.
18 And then I think we can move on to the rest of our
19 arguments.

20 THE COURT: Well, what I was going to
21 suggest -- and of course, I am not going to rely on
22 them. I actually think there is another issue that is
23 not in front of us today and won't have any effect on
24 the sentence. And I have a strong view that is not
25 shared by all judges. I have never taken a no contest

1 plea. And I think it is an interesting thing about what
2 facts the judge can rely on when all they have is -- it
3 is not an issue in this case -- the fact of conviction
4 where somebody said -- or I call it the prostituted
5 *Alford* plea in State Court where they say, I admit to
6 nothing. I am innocent. I didn't do a thing, but I
7 will take the deal. Which could have happened here, you
8 know, where there was a sentence more akin to a speeding
9 ticket or a DWI given here for whatever reasons, but I
10 suppose -- I won't speculate about that, because that
11 won't play much of a role. If it plays any role today,
12 the Government may say it in a small way prejudices
13 them; but, we will get into that shortly.

14 I think there is a clear remedy that is fair
15 to everyone here, because to the extent that your
16 client's rights are protected to remove it, I
17 respectfully decline to do that, and I would probably
18 decline to do it even if -- one, I am not going to rely
19 on them, but even if there wasn't this -- those that
20 were precisely, to my surprise, under state law used to
21 justify the registration of sex offender. But, even if
22 that was not an issue and I hadn't seen it, I believe
23 the remedy should be, here are the Complaint
24 allegations, because it is clear he didn't plead to
25 those. And the remedy is to add a short paragraph

1 saying, the Defendant denies these allegations in total,
2 and therefore pled to the charges that he pled to, and
3 just put that language in to say, yes, here is what is
4 charged in the Complaint. And the Defendant denies
5 these. And I will add that language to the end of that
6 paragraph. That is what I typically do, Mr. Olson.

7 MR. OLSON: That is fine. My objection is
8 still duly noted.

9 THE COURT: Oh, I'm not asking for a
10 stipulation. Do you want to be heard on this, Mr.
11 Newberry?

12 MR. NEWBERRY: No, we have nothing to add to
13 that.

14 THE COURT: So, I will just ask the Probation
15 Officer to add that. The objection is noted. And I
16 will just add that at the end of that -- that paragraph
17 for the record is paragraph 24, which I'll add that the
18 Defendant then and now denies all allegations set forth
19 in the Complaint.

20 I would suggest we do the following, then.
21 Absent any objections to the computations under the
22 Guidelines, other than the briefing that has been done
23 on what is a fair sentence and how the Court should
24 handle that, which in this context has become a,
25 especially in a deportation on a 16-level enhancement --

1 should I slow down? Sorry.

2 THE INTERPRETER: I'm okay, Your Honor.

3 THE COURT: Has become a major issue in most
4 cases in this District and across the country. But, I
5 will go ahead and make the findings as to the advisory
6 guidelines and then go straight to argument.

7 Mr. Olson, is that acceptable to you.

8 MR. OLSON: Yeah, my other objection as to
9 how to compute the terrorist threat is also duly noted.

10 THE COURT: Well, why don't we take that up
11 right now?

12 MR. OLSON: My other objection was in fact
13 whether terrorist threats is a -- continues to be a
14 crime of violence.

15 THE COURT: And that was in the supplemental
16 pleading --

17 MR. OLSON: That was in the supplemental --

18 THE COURT: I did get a chance to read them
19 over, so --

20 MR. OLSON: And I note that I was thinking
21 about this, and then I read the *Johnson* case, and I
22 thought about it some more, and I thought that in all
23 fairness to Mr. Pastor Sanchez-Martinez, that I should
24 just make a blanket objection to terrorist threats
25 continuing to be classified as a quote, unquote, crime

1 of violence. Noting that not only is this District
2 Court's precedent contrary to me, the Eighth Circuit has
3 affirmed that in several cases which I have cited. So,
4 I know that is contrary to precedent.

5 I simply have some questions about whether
6 terrorist threats, the way that it is written under
7 Minnesota law should continue to be classified as a
8 crime of violence. And so my objection is noted.

9 THE COURT: Do you want to be heard on that?

10 MR. NEWBERRY: Well, Your Honor, on this
11 issue, we do object. And we urge the Court to strike
12 the supplemental pleading as untimely.

13 I read the supplemental position this
14 morning. As I reviewed the record before the Court
15 today, I'm not sure whether the decision you make today
16 would be sustainable on appeal. And I say that because
17 I have not read the amended -- the Complaint that you
18 suggested was filed regarding the terroristic threats.

19 THE COURT: I haven't seen a complaint. I
20 have looked at the -- and there may not have been one.
21 I have seen the State Court record, and will be glad to
22 make you a copy with the statutory citation, because the
23 defendant either has to plead guilty to Subdivision 1,
24 2, or 3. He pled to 1.

25 And of course, one could make the argument,

1 if the conviction didn't control and one wanted to look
2 at the factual basis for the plea -- but, I probably --
3 not probably, I will take a position today, because I
4 think I have ample -- apart from any decisions I have
5 made in the past, I will take a position today on the
6 argument.

7 MR. NEWBERRY: Then, more specifically, with
8 regard to the argument Mr. Olson puts forward this
9 morning, I have not read, or have not had sufficient
10 time to read the terroristic threat conviction and the
11 extent to which there may be some reliance on the
12 following language, quote, "Reckless disregard of the
13 risk of causing such terror." Closed quote.

14 I simply don't know the extent to which that
15 part of the Minnesota Statute was relied on.

16 THE COURT: I am about to rule on it, because
17 I have got it right here. So --

18 MR. NEWBERRY: If you suggest to me that that
19 language played no role in the terroristic threat
20 conviction of Mr. Sanchez-Martinez, then I would agree
21 that there would be no issue on appeal, as I see it.

22 THE COURT: And as I understand terroristic
23 threat, and I will note the objection of the Defense, I
24 don't believe it makes any difference whether it played
25 a role or not. It plays no role in sentencing.

1 Subdivision 1 doesn't break out and -- in
2 State Court, and Subdivision 1 is the most seriously
3 treated. In other words, Subdivision 1 is intent to
4 terrorize. That is the title of Division 1, and there
5 is no subdivision. And I will get to the intent piece
6 in a moment.

7 Second, Subdivision 2 is, communicate to
8 terrorize, but that is for incendiary and bombing
9 devices. And Subdivision 3 is replica or firearms and
10 the use of those to threaten. Those, ironically or
11 otherwise, are treated less seriously under the state
12 guideline scheme than Subdivision 1. And that is
13 probably in part -- one is very generic. But, why don't
14 I just make a ruling? That might be in the best
15 interest of time. And if either one of you want to make
16 any additional objections, requests for clarification,
17 do so.

18 But the state record is clear that
19 Subdivision 1 of 609.713 entitled terroristic threat was
20 pled guilty to. And not to be indifferent, Mr.
21 Newberry, to your untimely argument. Would I probably
22 grant the request because it was untimely if I hadn't
23 been down this road before and it is coming up so
24 frequently if I thought there was some prejudice to
25 either the United States or the Defendant, because I

1 wasn't fully informed and able to proceed, separate from
2 what people think of any decision I make today? Then
3 the right thing to do would be to either strike it or
4 continue the case. I don't believe either are
5 necessary.

6 The statute reads, and I quote, it is first
7 entitled under Subdivision 1, which is, according to all
8 of the records that I have from the state system is what
9 was pled to, which would make sense, because the others
10 require anything from threatening to evacuate a
11 building, to exhibits, branches or otherwise, just
12 employs a replica or firearm, and they are using that
13 for a variety of different reasons.

14 Subdivision 1 states, "Whoever threatens ..."
15 it is entitled, "Threat and Violence; Intent to
16 Terrorize." And then here is what the statute says.
17 "Whoever threatens directly or indirectly to commit any
18 crime of violence with the purpose to terrorize another,
19 or cause evacuation of a building, or in reckless
20 disregard of the risk of causing such terror ..." in
21 other words, it is the intent to do something, and then
22 maybe in reckless disregard, as I interpret it,
23 consistent with the elements in the Jury Instruction
24 Guide, I might add. Or in reckless disregard of whether
25 it would cause the -- in other words, whether the

1 threat, directly or indirectly to commit a crime of
2 violence, whether the purpose was to terrorize, or in
3 reckless disregard of whether that would occur, may be
4 sentenced to more than five years, or up to five years
5 in prison or a fine of not more than \$10,000.

6 And then the other subdivisions actually
7 carry a lesser offense, a lesser penalty of up to one
8 year and one day, which is what the state sentence and
9 the -- without speculating about why the judge, what he
10 did in sentencing to time served, the one year and the
11 one day would have been a departure under the State
12 Guidelines, even if there was no criminal record under
13 Subdivision 1, which is clearly what was pled to.

14 But, the -- so, my view is, noting the strong
15 objection of the Defense, and is, as Mr. Olson says, but
16 I have ruled this way similarly, and I also believe that
17 I don't need an additional factual record, because it is
18 the elements under existing U.S. Supreme Court law,
19 *Begay* and other cases, it is the elements of the
20 offense, not the fashion under which it was committed.

21 It is, I find, a crime of violence, even with
22 the most recent narrow construction, because I have gone
23 the other way, not on this offense but on some others.
24 And while this will become relevant on the nature of the
25 crime of violence, in other words, whether we are about

1 to go to arguably the most important issue that affects
2 potentially most dramatically the sentence, whether it
3 is murder or terroristic threat, it is the same
4 enhancement, 16. It doesn't matter to the guidelines.

5 And so, it may be relevant for another
6 reason, what exactly was pled to. But, looking at the
7 elements of the offense and under 609 for the record,
8 703, Subdivision 1, I find noting the objection of the
9 Defense that it is a crime of violence.

10 And that I have taken due note to the role
11 that reckless disregard or indifference plays to that
12 element of that offense, but I find for the reasons
13 stated, it is a crime of violence.

14 Noting the objection of the Defense, and I
15 suspect, perhaps, over the objection of the Government,
16 we are about to go to an issue where I think the kind of
17 crime of violence it is becomes an issue which I think
18 is where most of the brief of Mr. Olson went, and where
19 most of them are going here and across the country on
20 this 16-level enhancement.

21 So, that creates a Total Offense Level of 21,
22 based upon the Category III. It is an advisory sentence
23 without any departures or variances of 46 to 57 months,
24 supervised release term of two to three years, fine
25 range of \$7,500 to 75,000, special assessment of \$100.

1 Absent an objection from the Government, Mr.
2 Olson, I will hear from you additional argument on given
3 the state of affairs, even though you have telegraphed,
4 I think, what you think a fair sentence is, anything you
5 would like to say?

6 MR. OLSON: Well, I think that I -- at least
7 I have tried, to the extent that a person can take a
8 34-year-old's life experiences and put them on a piece
9 of paper and give it to the Court, I think I have tried
10 to illuminate the background and the individual
11 characteristics of Mr. Sanchez-Martinez, and the
12 circumstances of this offense. I say that --

13 THE COURT: And I think you have.

14 MR. OLSON: Well, I appreciate that, because
15 I have spent quite a few hours talking with Mr. Sanchez
16 Martinez about his whole background, his upbringing, and
17 what it was like to come to this country as a young
18 person, work in the rural setting in Minnesota and find
19 a culture and an environment --

20 THE COURT: Did you tell him it is not very
21 far from where you grew up and where I grew up in
22 Austin, Minnesota.

23 MR. OLSON: I probably have in the past, but
24 I will tell him again that both Judge Frank and I are
25 from southern Minnesota. I from Rochester, and he from

1 the Spring Valley area. And so, we have got some
2 agrarian base in our souls, as well.

3 THE COURT: I'm 25 miles, it would be about
4 25, 30 miles straight east of Austin. He grew up in the
5 fancy town. I grew up in the little farm town of Spring
6 Valley, co --

7 MR. OLSON: I grew up outside the city
8 limits, at least. And my father grew up on a farm. He
9 was a poor farmer in North Dakota and Windom.

10 And so, you know, he comes here and -- you
11 know, he gets deported, goes back, gets deported again,
12 and this things happens -- it is kind of a sad state of
13 affairs when a person finds himself in this chaos of a
14 life situation, because he really doesn't have a life in
15 Mexico. And he knows he can't come back here because he
16 is not welcome here.

17 Now, I am going to get back to that in a
18 second because I think ultimately that is the overall
19 point of this law; but, he really was in desperate
20 circumstances. I have in only a couple of paragraphs
21 tried to illuminate on the trials and tribulations that
22 he faced this last time when he came back here and was
23 close to death crossing the desert getting kidnapped,
24 and a whole horrible set of circumstances.

25 He -- when I first met him at the Sherburne

1 County Jail, he had already been incarcerated from his
2 arrest down in southern Minnesota. It took some time to
3 get him up here. And he was actually happy to be where
4 he was, given the alternative. Healthcare, three meals
5 a day, and everything.

6 Now, when we get to the end of the question
7 about an appropriate sentence as I have noted, I mean, a
8 cynic could say: Well, let's just lock him up. He
9 wants to be locked up. Let's lock him up. It is not
10 really where he is at. No person enjoys incarceration.
11 You may enjoy incarceration as the lesser of two evils,
12 but nobody likes to be incarcerated.

13 Part of the obvious overall intent of this
14 Immigration policy in this criminal statute is to, I
15 suppose, impress upon individuals that we don't want in
16 this country, that they shouldn't come back. And once
17 they are deported, don't come back again. So, he is
18 back here.

19 He is not going back to Mexico just to cross
20 the border again to get back in prison and go through
21 this whole cycle again. He is an intelligent person.
22 He has been a hard worker all his life. He is not a
23 hardened criminal. This is the longest incarceration he
24 has ever faced. He understands he can't come back here.
25 And he doesn't want a life of being institutionalized or

1 imprisoned. He has avoided that so far in his life. He
2 is not going to start now, even though this will be his
3 longest imprisonment. But, with his health returned, he
4 is getting a little bit of education, he is thinking
5 about what he is going to do when he gets back there.
6 So that this time when he gets deported, after whatever
7 the length of incarceration is, he is not going to go
8 back to Vera Cruz, he is not going to get back into that
9 family situation, that organized crime situation which
10 drove him back here, he is going to go down there with
11 his health in tact and with a program to stay in place
12 and avoid the problem areas of the country, work and
13 stay out of this country. He understands that and he
14 gets the picture.

15 Now, obviously, as a part of my briefing, and
16 I don't have to reiterate too much, this -- I mean, this
17 16-point bump in terms of implementing a Guideline
18 Sentence puts an offense such as this in the same group
19 as rape and murder, and it is all 16 points.

20 THE COURT: True, true.

21 MR. OLSON: Number one, it is an anomaly
22 within the Guideline structure, itself. I have
23 discussed that in my position paper. It is also
24 somewhat ludicrous.

25 Obviously, we are not going to go back and

1 retry what happened two and a half years ago with this
2 fight with a former girlfriend thing. But, the fact
3 that he spends three months in the county jail and they
4 cut a deal for time served, I think that kind of says
5 something about how serious the situation was. It
6 certainly says how serious the court treated it.

7 But, to equate that on the same level as a
8 serious drug offense, a serious assault, you can rob a
9 bank, you can kill somebody, and it is 16 points. And
10 even the guidelines a number of years ago in an
11 application note noted that maybe that 16 bump isn't
12 always appropriate for everybody. So, I have suggested
13 a simple -- if we are going to use the charts, the
14 numbers, if you characterize that instead of 16 points,
15 you call it like a regular 8-point felony, we get into
16 the ballpark of 18 to 24 months.

17 And not knowing how to pick out numbers, and
18 also realizing that it is a criminal offense, he also,
19 to his credit, he is improving. His health has improved
20 dramatically. His diabetes is under control. And if
21 the Court were to give him 24 months, he has been in
22 jail since last summer. You know, he will be out in 18,
23 a little less than 18 months. And with his senses about
24 him and his health in tact, he will be in a position, I
25 think, to get back to his country without returning here

1 and causing us anymore problems.

2 You know, other than that, I don't think I
3 have anything additional to add, with one comment, that
4 I have found him to be a pleasant individual. He
5 typically has a smile on his face. He is pleased to
6 meet me. He likes to talk. And he appreciates the fact
7 that at least people have taken care of him at the
8 Sherburne County Jail. And he assures the Court it is
9 not his intention to become a revolving door of
10 imprisonment. He is going back to Mexico and he is
11 going to stay there.

12 THE COURT: Do you know if your client wishes
13 to address the Court, Mr. Olson?

14 MR. OLSON: I think he would like to say
15 something.

16 THE COURT: Sir, you have the right to say as
17 much or as little as you like.

18 Some Defendants talk at these hearings, some
19 don't. As your lawyer knows, the rule is I cannot use
20 it against any defendant if they don't want to say
21 something more than what their lawyer has said.

22 So, with that, is there anything you would
23 like to state or ask the Court?

24 THE DEFENDANT: I would like to say
25 something. First of all, I would like to thank God for

1 being here. I feel very happy. Happy. My health is
2 good. When I was on the outside I was doing very bad.
3 But, thank God, here in this place I am happy and
4 everything, and doing very well healthwise. And I have
5 learned and I made a mistake.

6 And now I know what I really want to be. And
7 I am very grateful to the people here. I am grateful to
8 all of you. I have been treated very, very well. And I
9 can't have any complaints. And thanks to you guys and
10 to God, I am doing very well healthwise.

11 And I think now I can go home feeling very
12 happy. It was a wonderful experience. After studying
13 so many years here, I have been in jail here for eight
14 months, and I think in eight months I will be able to
15 take away from that what I never was able to do in my
16 life before.

17 The reason why I returned was because of my
18 illness. I was dying. And because of the problems that
19 I had over there. But now I have become very familiar
20 with the word of God, and now I know what my purpose is.
21 And I am very happy with the purpose that I now have in
22 mind.

23 So now I am just waiting for whatever it is
24 that you guys decide. And that will be just fine. And
25 thank you for everything. That is all.

1 THE COURT: I would like to know before we go
2 on to Mr. Newberry -- he said at least twice he now
3 knows what his purpose is. I would like to hear what
4 that is.

5 THE DEFENDANT: Yes. I have read the word of
6 God. And my purpose is that I have come to understand,
7 and I think my purpose in God having me come back here
8 was so that I could come to understand his word. And
9 with what he has made me understand, I need to go back
10 to where I am really understanding what it is that the
11 word of God is saying. Because the people back where I
12 am from are just blinded by that.

13 And now I will be the first one to go back
14 there and bring that truth to them. That is my best
15 work that I can do.

16 THE COURT: Thank you.

17 THE DEFENDANT: That's all.

18 THE COURT: Mr. Newberry?

19 MR. NEWBERRY: Well, Judge, we are all in a
20 difficult spot, here. There is no question about that.
21 And you are the one that wears the robe, so you get to
22 make the ultimate decision.

23 What I can say is if we were here in a
24 situation where Mr. Sanchez-Martinez had not been
25 deported three times as he stands here today, if he

1 hadn't had two drunk driving convictions, the drug
2 conviction, the forgery conviction and the terroristic
3 threat conviction, which there may be some question
4 about, then these arguments would resonate more clearly.
5 But, we are not in that situation.

6 We do have an individual who has been
7 deported three times. So, this is not a new phenomenon
8 for Mr. Sanchez-Martinez to understand that he is not
9 welcome in the United States.

10 It is also a difficult circumstance, and
11 albeit understandable in a human level that a person
12 would attempt to leave a violent community where Mr.
13 Sanchez-Martinez lived, where I suggest he was in and
14 around drug or gun or gang violence, and even violence
15 associated with his own family members.

16 To suggest then that a person would leave
17 that environment, come to the United States, may be
18 understandable. But then you would hope that that
19 individual would avoid any violation of the law in the
20 United States. Here again, we don't have that.

21 I'm not sure whether the Court would consider
22 one last effort to continue the sentencing for the
23 purpose of obtaining a transcript of the plea to the
24 terroristic threat, obtaining whatever charging
25 documents there may have been in the plea petition, then

1 I believe you might have sufficient facts upon which to
2 properly evaluate that circumstance.

3 There is no question but that on the human
4 level we can understand -- we can understand a sad
5 story. And this is certainly a sad story.

6 But, ultimately, if we accept Mr.
7 Sanchez-Martinez at his word, he said he came here
8 because of the violence in his community, and number two
9 because of his ill health. Well, if we even look at the
10 Guidelines, it would suggest that he will be back again
11 for those reasons, alone. And so that is why we have
12 Guideline sentences, to deter people from committing
13 similar or other criminal acts in the United States.
14 And so it is for those reasons we have urged the Court
15 to impose a guideline sentence based on the original
16 pleadings of the parties, which clearly demonstrated
17 that there was a crime of violence for which the
18 16-level increase was applicable, notwithstanding based
19 on the amended submission today by defense counsel
20 regarding the language of the statute.

21 And I must confess, Your Honor, that given
22 the reading of the statute that you provided for us,
23 where it makes reference to the reckless disregard, I
24 believe that Mr. Olson is correct. Because when we look
25 at the statute, there are intentional acts and then

1 there are acts which are less than intentional, and
2 then --

3 THE COURT: I don't believe so. One, it is
4 the most overcharged felony in State Court. I handled
5 hundreds as a State Prosecutor and Judge. Intent is an
6 element of every single terroristic threat. Intent to
7 terrorize is an element of the offense. And whether the
8 effect on the person in reckless disregard -- in other
9 words, that is why they don't break out the sentence.
10 The state Sentencing Guidelines does not break out the
11 reckless disregard language, neither does Subdivision 1,
12 so I will just repeat it, whoever threatens, directly or
13 indirectly, because we could actually stop right there.
14 Well, I wonder what that means, directly or indirectly?
15 So, it is threat to commit a crime of violence, to
16 terrorize another, or in the risk of reckless disregard.

17 I mean, I will take the further step of
18 saying that even if it is your interpretation, I have
19 held before and I will hold again today, it is a crime
20 of violence even under the most narrow reading of the
21 statute. Because I suspect I have, more than most of my
22 colleagues in this District, been excluding certain
23 crimes, because I think the key is the elements under
24 *Begay*. What are the elements he pled to under
25 Subdivision 1? And reasonable people, I agree with you,

1 Mr. Newberry, may differ. And I suppose we are in this
2 ironic position of where the prosecutor and the defense
3 agree on this.

4 I don't believe that a transcript is going to
5 -- I will probably now order one, but I will probably
6 respectfully not continue the case, because I -- for a
7 different reason. I believe that whether I use the
8 3553(a) factors and how I am going to handle the
9 enhancement, I would end up at the same place, anyway.

10 MR. NEWBERRY: Well, I am certainly comforted
11 by that, I must tell you that.

12 What I can say is with regard to the statute
13 that we are talking about, the terroristic threat
14 statute, Minnesota Statute, if we are involved with that
15 categorical approach and the statute is over broad with
16 regard to could it be a crime of violence or not, there
17 would be an issue.

18 Then we go to the modified categorical
19 approach --

20 THE COURT: True.

21 MR. NEWBERRY: Then the Court is allowed to
22 look at the charging document, the plea petition, the
23 transcript and the colloquy of the Court.

24 THE COURT: I agree.

25 MR. NEWBERRY: We don't have any of those

1 things. So, and with regard to the notion that the
2 Defendant received the sentence of time served, I would
3 suggest that it is of no significance. It certainly
4 would suggest that it wasn't the most serious crime.
5 But, you know as well as I do, that courts often
6 sentence a defendant recognizing that he is going to be
7 deported. So, we don't have to spend the money to
8 incarcerate him.

9 THE COURT: That is true.

10 MR. NEWBERRY: So, the fact that he got a
11 sentence of time served is of little significance. But,
12 the point is that we simply don't have the information
13 to fully evaluate it, though.

14 Having said that, if you were going to impose
15 a sentence in the alternative, I suspect that that might
16 be sustainable on appeal.

17 THE COURT: Something that I probably would
18 have the right to do, whether I say so now, and I am
19 sure that Mr. Olson, you may have to explain when we are
20 done here what this exchange has been between the
21 lawyers and the Court, but I will go ahead and order,
22 and I will go back and re-review what the Probation
23 Officer has, because I am assuming they sent us
24 everything they had. But, we will go ahead and take a
25 look at that. And I am sad to say that many of these

1 offices, whether it is the recent crisis they are in
2 financially, they seem to be -- many of these State
3 Courts seem to be almost indifferent to sending us
4 information. And I use the word indifferent because it
5 takes them a long time. And in most of the sentences we
6 do, we never have received information.

7 Here we have -- don't have a transcript, but
8 what I am going to do today, unless -- I intend to
9 proceed with the sentencing, because I believe that I
10 will end up at the same place, anyway, with the
11 sentence, not necessarily suggesting everybody is going
12 to agree on, well, that maybe should be the case, but
13 that will be the case and that is how I felt before I
14 came into the courtroom.

15 But, I will go ahead and order those things
16 and reserve the right -- I mean, I have to be able to --
17 it is not a constitutional doctrine, but I have to be
18 able to sleep at night. So, if I get something back
19 under the modified approach and said, had I known this,
20 it is so different than what I assumed, I just can't
21 envision that. Because I think for other reasons under
22 3553(a) -- and frankly speaking, I am going to come down
23 as I have in a number of these cases off the 16-level
24 enhancement over the Government's objection to a lower
25 level, not to where Mr. Olson wants me to go, but what I

1 think reflects what he pled to and is an acknowledgement
2 that, well, pleading to terroristic threat, however you
3 see the approach, shouldn't be treated the same way as
4 pleading to murder, as just one example, or child sexual
5 abuse, as another.

6 I will order these things, myself, just to
7 get -- to soothe my own conscience, apart from its legal
8 effect. But, I will probably -- I am going to go
9 forward. No disrespect intended to you or to Mr. Olson.

10 MR. NEWBERRY: No disrespect taken, sir.
11 Thank you.

12 THE COURT: Do you want to have the last
13 word, Mr. Olson?

14 MR. OLSON: I think we are ready to hear from
15 the Court on this.

16 THE COURT: Here is my view. I will say this
17 first to you, Mr. Sanchez-Martinez. The issue isn't
18 whether a human being should be treated the way you were
19 treated in Mexico, and I mean no disrespect to your
20 native country. I am all too aware, and perhaps not as
21 aware as I should be of some of the poverty that many
22 people in this country, most probably don't understand,
23 some of the obstacles that you have that most of us
24 don't understand. The flip side is, and you talked
25 about your purpose today, and the flip side is, you

1 talked about what you are going to do when you go back.
2 And then I will talk about what has been mentioned
3 about, well, why wouldn't you come back a fourth time,
4 in just a moment. But, I have been to Mexico. I
5 haven't been in some of the real poverty stricken areas,
6 but I have been to Guatemala, Costa Rica and I have
7 worked on what is called a Habitat for Humanity Project
8 with a couple of my daughters in those countries, even
9 though I am embarrassed to say, I don't speak Spanish,
10 and they speak it fluently.

11 It is one of my many failures in life. And
12 there is something special about what they have here.
13 They don't need the fancy cars, money in the bank
14 accounts. Poverty is poverty. But, they have a
15 spiritual life and value other people and things in a
16 way that many of us don't understand.

17 So, I mean no disrespect to many parts of
18 your country, because I think there are parts that we
19 don't get, either. But, my view today is this. And
20 some of the things that were said by Mr. Newberry and
21 Mr. Olson are things that lawyers need to say and have
22 to say, it is their responsibility to say. So, I have
23 really no issue with that.

24 What I have a difficult time with is the fact
25 that you came back, no matter how I treat the

1 terroristic threat. You came back three times, and I
2 will deal with that. I take you at your word today,
3 sir.

4 And something that will play no role in my
5 sentence, oftentimes what is not said in these hearings,
6 because it is not relevant is, not only did you come
7 back, and this really can't be held against you, and it
8 is not part of my sentence, but everyone knows what a
9 joke it is that these employers who are never until
10 recently prosecuted, Hormel and others, they know you
11 are good people, they know you are good workers, so you
12 not only come back, but you come back to the same rural
13 areas because you know nothing is going to happen.

14 And proof of that is that in each State Court
15 case you had you got everything but a written apology
16 from the judge, the way it looks to me. Because your
17 lawyer is right, you have done little or no time. And
18 maybe that was a disservice to you -- not intended I am
19 certain -- whether it was because of the deportation?
20 Because the first couple of offenses, everything kept
21 getting stayed. They even dismissed the violation so
22 they could deport you the second time.

23 And so what I have to look at today is, what
24 is that sentence that will promote respect for the law,
25 that is sufficient but not greater than to serve what I

1 have to carry out my oath, but to treat you as a human
2 being. And what I am going to do is this.

3 First, noting the objection of the
4 Government, because I think that is the best way to
5 proceed, here, I don't believe on the departure basis
6 that the Guidelines contemplated, and it is contrary to
7 3553(a) to say, I treat this human being the same
8 whether it is murder or a heinous sex crime or a
9 terroristic threat. I am going to treat it at what is
10 called a level 12 enhancement. I don't believe that 8
11 captures what you pled to, no matter how it was pled.

12 And so, if I treat it as a level 12, which is
13 also going to be consistent in a moment with the 3553(a)
14 factors, the advisory sentence is 30 to 37 months. I
15 will be imposing a 36-month sentence today, which I
16 believe is sufficient but not greater than to meet the
17 categories of the rules of sentencing.

18 It will promote respect for the law and
19 recognize the returns you've made here, and trying to
20 respect you as a person on why you returned. And I
21 don't believe it treats you different than
22 similarly-situated individuals.

23 And so, on the one hand it is a departure
24 from the Guidelines for the record because I decline to
25 impose a 16-level enhancement. I will treat you in an

1 offense level 17 with a Criminal History Category of
2 three, so that is where I came up with the 30 to
3 37 months.

4 And even if I set the Guidelines aside,
5 looking at your record, who you are, taking you at your
6 word, I believe that a sentence of 36 months, and they
7 will take the time off for credit for time served by the
8 Bureau is a fair and appropriate sentence under all of
9 the circumstances. Even though I reserve the right to
10 take a second look, I am quite certain it will play no
11 role in any change or reduction of sentence.

12 I am going to order the transcript, assuming
13 we can get our hands on it, and I will double-check all
14 of the records that we have here, because I didn't read
15 everything Probation had this morning.

16 Before I actually impose it and ask for a
17 recommendation for a facility, in light of our extensive
18 discussion that we have had upon this terroristic
19 threat, do you want to be heard additionally, Mr.
20 Newberry?

21 MR. NEWBERRY: No, thank you, Your Honor.

22 THE COURT: Mr. Olson?

23 MR. OLSON: No, thank you, Your Honor.

24 THE COURT: Do you have a recommendation for
25 a facility? I don't think it is going to make much

1 difference. I think even if I recommend a local
2 facility, I think your client will be moved to the
3 southern part of the United States.

4 MR. OLSON: He indicated to me he would
5 prefer to be moved to the southern part of the United
6 States because it will make his inevitable deportation
7 faster. So, that is fine.

8 THE COURT: As the sentence of this Court and
9 judgment of the law, I commit you to the custody of the
10 Bureau of Prisons for a period of 36 months. Unlike
11 State Court where the Judge is required to announce how
12 many days credit, those months will be evaluated and
13 deducted from that 36 that you have been in custody.
14 They must get it right most of the time because we have
15 very few motions or requests saying we haven't been
16 given the credit that we were entitled to. Then you
17 will see additional credit from the Bureau for good time
18 as you serve your sentence. I recommend a facility in
19 the southern part of the United States as close to
20 Mexico as possible. And that would probably happen
21 anyway, sir, even if you ask for Minnesota, because as
22 you are maybe aware, then they can do the Immigration
23 hearings -- they do everything all at once.

24 I impose no fine given your financial
25 circumstances. I sentence you to a term of three years

1 of supervised release. And that won't hold up your
2 return to -- the supervised release term -- the moment
3 your time is done with the Bureau, you will be deported,
4 either voluntarily or involuntarily. That is not my
5 decision to make.

6 The three years of supervised release, if you
7 would remain here in this country or return, would be as
8 follows: That if you return to the country and remain
9 here, you must report to a probation officer within
10 three of your release from prison. Second, you shall
11 not commit any crimes, be they federal, state or local.
12 Third, you shall not possess any controlled substance.
13 And if you remain in this country, you will be tested
14 once within two weeks, and an additional two times
15 within a reasonable amount of time.

16 You shall not possess a firearm, ammunition,
17 destructive device or other dangerous weapon. You shall
18 cooperate in a DNA sample, as every federal defendant
19 has since October of 2004. You shall comply, and that
20 is one reason I looked at the state statute this
21 morning. If you remain in the country or return within
22 that three-year period, you shall comply with the
23 requirements of the state sex offender registration
24 notification law and the Federal law under, for the
25 record, and I apologize for citing the number. 42,

1 Title 42, USC Code 16901. Probation would work with you
2 on that if you remain in this country.

3 In other words, there is both the state
4 requirement and the federal requirement. And they would
5 work with you if you remained in this country or
6 returned within the three-year period.

7 I direct that you comply with all Immigration
8 Rules and Regulations. So if you are deported, which is
9 not my decision to make, either voluntarily or
10 involuntarily, you can enter the United States legally,
11 but not illegally. And upon any re-entry, you should
12 report to a probation officer within three days if it is
13 within that three-year period.

14 I impose a \$100 special assessment fee for
15 the Crime Victims' Fund, which they will withhold from
16 any wages earned while in the Bureau of Prisons, because
17 it can't be waived or suspended by me. You have the
18 right to take an appeal. I don't believe there's an
19 appeal waiver, Mr. Newberry?

20 MR. NEWBERRY: That is correct.

21 THE COURT: You have a right to take an
22 appeal from the case and the sentence. The notice of
23 appeal must be filed within 10 days after the judgment
24 of this Court is filed, called the criminal judgment,
25 and that will be done, I suspect, either tomorrow or

1 Monday. If you can't afford to hire a lawyer, one will
2 be appointed to represent you in the case.

3 As to the designation, sir, the Bureau of
4 Prisons makes that decision out of Texas for all
5 defendants. It takes them two to three weeks, so you
6 would likely stay here for two to three weeks. And
7 sometimes we have learned in the last few months there
8 has been a short delay or a little more than a short
9 delay on being transported, because you then are
10 transported to Rochester and flown out down there to
11 your facility, generally speaking.

12 Ms. Perez, is there anything else I have
13 overlooked?

14 THE PROBATION OFFICER: No, Your Honor.

15 THE COURT: Let me say this to you, sir --
16 anything further, Mr. Newberry?

17 MR. NEWBERRY: Nothing further.

18 THE COURT: Mr. Olson?

19 MR. OLSON: No, Your Honor.

20 THE COURT: And I will follow through. I
21 will get copies and I will make sure whatever I get, you
22 get. I will go back through the records that we have to
23 see if there is any other information there. I will
24 just automatically provide it to both of you. Maybe
25 more importantly to you, sir, I must say it has been

1 quite a morning for me. There are two firsts, and I
2 have been -- this is my 26th year as a Judge. But, two
3 things, at least, that haven't happened in Federal
4 Court. One is, on a case before you a defendant came
5 in, and I am sure that he would be stereotyped in part,
6 frankly, because he was unemployed at the time of his
7 sentence a few years back and he is Native American. He
8 came in and the United States asked for him to pay up
9 his restitution at \$75 a month. And he turned to me and
10 said, I would rather pay \$75 per paycheck. I just got a
11 job, so I will pay at least \$150 a month.

12 It is a first for me, and to his credit. And
13 you, sir -- and I saw a smile on a couple of the Deputy
14 Marshals' faces -- when you thanked for your good
15 treatment, you thanked for the good medical care you
16 received and you say you were in a good place, and if it
17 was interpreted correctly you used the word happy. It
18 says something about you. And you have convinced me
19 that you have this purpose in mind, and you either have
20 it and believe it, or it was kind of an attempt to get
21 over on me. And I don't think it was the latter. But,
22 if it was, then only I am responsible.

23 So, if you follow through with what is here
24 and what is here, I think you mean what you say and when
25 you are done serving your sentence, and this isn't said

1 because I think you should agree with what I have done,
2 but I hope things work out for you. All right?

3 THE DEFENDANT: Yes.

4 THE COURT: We are adjourned. All right?
5 And I will get that information to you. All right.

6 (Adjournment.)
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11 Certified by: s/ Jeanne M. Anderson

12 Jeanne M. Anderson, RMR-RPR
13 Official Court Reporter
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